

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYANT LEE WEATHERS,

Defendant-Appellant.

UNPUBLISHED

April 19, 2012

No. 299968

Wayne Circuit Court

LC No. 10-003248-FH

Before: M.J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ The trial court sentenced him, as an habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of two years for the felony-firearm conviction and 3 to 20 years for the felon-in-possession conviction. He appeals as of right. Because the erroneous jury instruction did not relate to a disputed factual issue, sufficient evidence supported defendant's felony-firearm conviction, the trial court properly sentenced defendant to consecutive terms of imprisonment, and defendant is not entitled to resentencing, we affirm.

Defendant's convictions arise from an incident that occurred on February 16, 2010, when the police responded to a report of domestic violence involving a man threatening his girlfriend with a gun. When the police arrived, they observed Crystal Harris standing outside a house in the snow without a coat. She appeared visibly upset, agitated, and shaken, and reported that defendant had threatened to shoot her if she went back inside the house to retrieve her belongings. The officers received no response when they knocked on the door to the house. They testified that Harris gave them permission to enter the house, and they entered through a side door. They observed defendant lying on a mattress in the living room. A loaded shotgun was leaning against a wall a couple of feet from his head. After the officers arrested defendant, he voluntarily stated that he had the shotgun for "home protection."

¹ The jury acquitted defendant of domestic violence, MCL 750.81(2).

At trial, Harris testified that the house belonged to her only, that she did not believe that defendant knew about the shotgun, that she had never seen him with the gun, and that the gun was stored out of sight under the mattress of the bed.

I. JURY INSTRUCTIONS

Defendant argues that reversal is required because the trial court erroneously instructed the jury regarding constructive possession when it instructed on the possession element of the firearm offenses. Defendant concedes that he did not preserve this issue for appellate review with an appropriate objection at trial. See *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (an objection on one ground is insufficient to preserve an appellate attack on a different ground). Therefore, our review of this issue is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), this Court held that “[a] defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him.” See also *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Although our Supreme Court overruled *Williams* in part in *People v Burgenmeyer*, 461 Mich 431, 440; 606 NW2d 645 (2000), the Supreme Court approved of the *Williams* Court's discussion of “constructive possession” for firearms cases. *Id.* at 436-438.

In this case, the trial court instructed the jury on constructive possession in accordance with CJI2d 12.7, the standard “constructive possession” jury instruction in narcotics cases. The trial court stated:

Possession does not necessarily mean ownership. Possession means that either one, the person has actual physical control of the thing as I do the pen I am now holding. Or two, the person has the right to control the thing even though it is in a difference room or place.

Possession may be sole where one person alone possesses the thing. Possession may be joint where two or more people share possession.

It is not enough that the Defendant merely knew about the firearm. The Defendant possessed the firearm only if he had control of it or the right to control it either alone or together with someone else.

As defendant asserts, this instruction does not properly explain the possession element of felony-firearm because it does not convey that a firearm must be “reasonably accessible” to a defendant in order to be possessed, and it improperly suggests that the possession element may be established if the defendant merely has the right to control a firearm, even if the firearm is in a different room or place. Although the instruction constituted plain error, we are not persuaded that the error affected defendant's substantial rights.

Where an omitted element in a jury instruction is uncontested and supported by overwhelming evidence, such that the jury's verdict would have been the same absent the error, the instructional error may be considered harmless. *Neder v United States*, 527 US 1, 17; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Kowalski*, 489 Mich 488, 506; 803 NW2d 200 (2011).

Here, the trial testimony did not create a factual issue regarding whether the firearm was reasonably accessible to defendant. The police officers testified that the shotgun was leaning against a wall in plain view, a couple of feet from defendant's head, whereas Harris testified that the gun was stored under the mattress in the living room, where the officers found defendant when they entered the house. Thus, the testimony undisputedly showed that the shotgun was reasonably accessible to defendant. The principal factual issue at trial was not the shotgun's accessibility, but rather, whether defendant knew of the gun's presence. Harris testified that, to her knowledge, defendant did not know about the gun. The trial court's jury instructions informed the jury that, to convict defendant of felony-firearm, it must find that "he knowingly carried or possessed a firearm." Because the error in the trial court's instructions did not relate to a disputed factual issue, it did not affect defendant's substantial rights. *Neder*, 527 US at 17; *Kowalski*, 489 Mich at 506. Accordingly, reversal is not required.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his felony-firearm conviction because it did not establish that he possessed the firearm. When reviewing the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). We must resolve all conflicts in the evidence in favor of the prosecution. *Id.*

A defendant has constructive possession of a firearm if he is aware of its location and it is reasonably accessible to him. *Burgenmeyer*, 461 Mich at 438. Possession may be proven with circumstantial evidence and reasonable inferences drawn from the evidence. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005).

The police officers testified that, when they entered the house, defendant was lying on a mattress and a loaded shotgun was leaning against the wall a couple of feet from defendant's head. Defendant also volunteered that the gun was for "home protection." This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find, beyond a reasonable doubt, that defendant possessed the shotgun. Although defendant argues that Harris was the person living in the house, and she testified that defendant was unaware of the gun, her credibility was for the jury to decide. This Court must resolve all conflicts in support of the jury's verdict, which the officers' testimony supported. See *Williams*, 268 Mich App at 419.

B. CONSECUTIVE SENTENCING

Defendant next argues that the trial court improperly ordered that his felony-firearm sentence be served consecutive to his felon-in-possession sentence. This argument is based on

defendant's contention that the information listed domestic violence as the underlying offense for the felony-firearm charge. The record fails to support his contention. The information charged defendant as follows:

COUNT 2: WEAPONS - FELONY FIREARM

[Defendant] did carry or have in his/her possession a firearm, to-wit: shotgun, at the time he/she committed or attempted to commit a felony, to-wit: felon in possession of a firearm; contrary to MCL 750.227b. [750.227B-A]

Thus, the information clearly indicates that the prosecutor charged felon-in-possession as the underlying felony of the felony-firearm charge. Accordingly, defendant's argument lacks merit.

C. RESENTENCING

Finally, defendant contends that he is entitled to resentencing if this Court vacates one of his convictions. His argument is based on his erroneous belief that his current convictions affected the scoring of prior record variable (PRV) 1 of the sentencing guidelines. To the contrary, PRV 1 pertains only to a defendant's "prior high severity felony convictions" that occurred "before the sentencing offense was committed[.]" MCL 777.51(2). Thus, defendant's current convictions did not affect the scoring of PRV 1. In any event, because we affirm both of defendant's convictions, his argument necessarily fails.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio